Northwest Community Nursing and Health Service, Inc. *and* Local 5022, Federation of Visiting Nurses and Health Professionals, a/w American Federation of Teachers, AFL–CIO. Case 1–CA–27222[1]

March 6, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On July 29, 1991, Administrative Law Judge Lowell Goerlich issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions[4] and to adopt the recommended Order as modified.

[1] The judge erroneously captioned this proceeding as Case 1–CA–28722.

[2] The General Counsel's motion to strike the Respondent's references in its exceptions and brief, and accompanying affidavit, to a subpoena directed to the Respondent's executive director, Beverly McGuire, is granted as this matter was not submitted as record evidence at the hearing in this proceeding. *Redok Enterprises*, 277 NLRB 1010 fn. 1 (1985).

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] We agree with the judge, for the reasons stated in his opinion, that the General Counsel made a prima facie case that employee Andrea Jean Petteruto's filing a grievance was a motivating factor in the Respondent's discharge of her. In adopting the judge's conclusion that the Respondent would not have discharged Petteruto even in the absence of her filing of a grievance with the Union, we find that the evidence fails to support the Respondent's stated reasons for discharging Petteruto based on job performance. We note in this regard that the Respondent's medical director, Kenneth John Piva, admitted at the hearing that Petteruto's job performance improved over the course of her employment; further, the Respondent presented no specific credible evidence demonstrating either that Petteruto had been warned that her overall job performance was so deficient as to warrant discipline or that any patient had complained to the Respondent about Petteruto's performance. We therefore agree with the judge that the Respondent failed to meet its evidentiary burden under *Wright Line*, 251 NLRB 1083 (1980). We also find no merit to the Respondent's contention that Petteruto's filing of a grievance with the Union was not protected under the Act. See generally *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984).

Although we find that the Respondent, through Piva, violated the Act by telling Petteruto on March 30 that she was fired for filing a grievance, we note that Piva did not use the words ''poor judgment'' in speaking to Petteruto on that day. Those words were used by Piva in speaking to Petteruto on March 15. The General Counsel's complaint does not plead a violation on March 15. Accordingly, we shall amend the proposed Order and notice by deleting the reference to ''poor judgment.''

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Northwest Community Nursing and Health Service, Inc., Pascoag, Rhode Island, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

''(b) Informing an employee that her discharge had been caused because she filed a grievance under the labor agreement.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discourage concerted union activities by unlawfully discharging employees for filing grievances against us under our labor agreement with the Union.

WE WILL NOT inform employees that their discharges have been caused because they have filed a grievance under our labor agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Andrea Jean Petteruto (Ruggieri) immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to the seniority and other rights and privileges previously enjoyed, discharging if necessary any employee hired to replace her, and WE WILL pay her the backpay she lost because we discriminatorily discharged her, with interest.

WE WILL expunge from our files any reference to the discharge of Andrea Jean Petteruto (Ruggieri) and WE WILL notify her, in writing, that this has been done and that the evidence of these unlawful actions will not be used as a basis for future discipline against her.

NORTHWEST COMMUNITY NURSING AND HEALTH SERVICE, INC.

Kevin J. Murray, Esq., for the General Counsel.
Richard DeOrsey, Esq., of Cranston, Rhode Island, for the Respondent.
John V. Callaci, Esq., of Providence, Rhode Island, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LOWELL GOERLICH, Administrative Law Judge. The charge filed by Local 502, Federation of Visiting Nurses and Health Professionals, a/w American Federation of Teachers, AFL–CIO (the Union) on April 9, 1990, was served on Northwest Community Nursing and Health Service, Inc. (the Respondent), by certified mail on April 10, 1990. A complaint and notice of hearing was issued May 18, 1990. In the complaint, among other things, it was alleged that the Respondent discharged Andrea Jean (Rugguiri) Petteruto,[1] in violation of Section 8(a)(3) of the National Labor Relations Act (the Act).

The Respondent filed a timely answer denying that it had committed the unfair labor practices alleged.

The matter came on for hearing in Boston, Massachusetts, on May 1, 1991. Each Party was afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been carefully considered.

On the entire record in this case and from my observation of the witness and their demeanor, I make the following

FINDINGS OF FACT, CONCLUSIONS, AND REASONS THEREFOR

I. THE BUSINESS OF THE RESPONDENT

At all times material, Respondent, a corporation, with a principal office and place of business in Harmony, Rhode Island (Respondent's Harmony facility), and a clinic located in Pascoag, Rhode Island (Respondent's Pascoag facility), has been engaged in providing community nursing and health care services.

During the calendar year ending December 3, 1989, Respondent, in the course and conduct of its operations described above, derived gross revenues in excess of $100,000.

During the calendar year ending December 31, 1989, Respondent, in the course and conduct of its operations described above, purchased and received at its Harmony facility products, goods, and materials valued in excess of $5000 directly from points outside the State of Rhode Island.

Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICE

Andrea Jean Petteruto (Ruggieri) was employed as a probationary employee by the Respondent at is Pascoag facility on February 20, 1990, and discharged on March 30, 1990. In August 1989, she had received her degree of licensed practical nurse (LPN) and was licensed in November 1989. Her job with the Respondent as a LPN was her first full-time job as a LPN. The Respondent, when it hired her, was aware of her lack of experience. She received no formal training from the Respondent but learned her duties from instruction on the job. She was the only LPN working at the Pascoag facility.

Under the labor agreement between the Respondent and the Union, Petteruto would have remained a probationary employee for 6 months' duration. As a probationary employee she was subject to the following contractual provision:

> There shall be no recourse for termination of the employment of an employee during the probationary period.
>
> During the probationary period, discipline, layoff, transfer or discharge will be at the sole discretion of the Employer without recourse.

However the contract also contained the following provision:

> Article XVII, section 17.01:
>
> The employer agrees not to discriminate in hiring, promoting, advancing, or assigning positions in any other term or condition of employment against an employee because of race, color, national origin, religious affiliation, sex, age, physical handicap or Federation activity.[2]

Probationary employees were not barred from filing grievances under the contract.

On March 13, 1990, Petteruto filed a grievance under article 8.01(a) and (b) of the contract. She alleged the employees were denied a ''30 minute uninterrupted lunch period'' as was required by the contest. Prior to filing the grievance Petteruto had contacted Dr. Kenneth John Piva, medical director of the clinic at Pascoag around March 8, 1990. Among other things she asked him about lunches and said it was ''unfair'' that she didn't get a lunch break. Piva replied, ''when its your turn to cover the desk, you have to be here.'' She reminded Piva that under the contract he was to have

[1] Petteruto was married sometime after her discharge. She will be referred to by her married name, Petteruto.

[2] Federation actually refers to union activity. A grievance under this section was filed relating to the discharge of Petteruto. The arbitrator is holding the grievance in abeyance subject to the outcome of this proceeding.

''a half an hour'' Piva said, ''I really can't do anything about that.''[3]

A day or two after the lunchtime grievance was filed, Piva called Petteruto into his office; a copy of the grievance was on Piva's desk. He told Petteruto that he was ''upset'' and that she should have come to him first. Petteruto reminded Piva that she had talked to him about the lunch situation. He replied that he ''would have to come up with a plan so that we would have lunches.''[4]

The grievance was resolved in Petteruto's favor by rotating the schedule so that the effected employees would have have an uninterrupted lunch period.

Piva further said that ''an the meeting[5] on Monday some negative things were said'' about Petteruto.

On March 30, 1990, Piva called Petteruto into his office and told her ''you're fired or we have to let you go . . . you did it to yourself by going to the Union and when Bev [Beverly McGuire, executive director] received the grievance she wanted to fire you on the spot.''[6]

The foregoing evidence which constitutes the General Counsel's prima facie case, if credited, clearly establishes that Petteruto was discharged for filing a grievance.

Piva, who was the principal witness of the Respondent, denied that Petteruto had been fired for union activities. He testified that he disapproved of her ''overall'' performance. However, he testified that ''over the course of her employment'' she had shown improvement in work performance but not enough to keep her. ''She was good talking to patients, she had a very good personality. She was very pleasant to the patients, they seemed to like her.'' She had ''fair'' organization skills. While she was told she could be fired for ''any reason,'' Piva did not tell her that ''if her performance did not improve she'd be terminated.''

Specifically, Piva testified that Petteruto ''showed poor judgment in filing the grievance'' and he felt that the grievance was ''unnecessary'' ''I was annoyed with Andrea for not talking about it first'' ''she reflected poor judgment and extreme action.''

Petteruto's grievance was the only one which had been lodged against Piva during his 3-1/2 years of employment.

Although Piva testified that he had fired Petteruto, he said that it was a ''mutual decision'' between McGuire and him. According to Piva on the day[7] on which he decided to fire Petteruto he discussed the matter with McGuire, ''more or less about her job performance and the dissatisfaction that we were having.'' McGuire suggested that the reasons for Petteruto's discharge be ''memoraliz[ed].''

Piva's written reasons were:

> Poor decision making judgement .
> Lack of focus in setting priorities.
> Staff complaints with job performance.
> Slowness in developing necessary clinic skills.

McGuire's written reason were:

> Discussion with Dr. Piva re Andrea's dismissal. Since our recent discussion about termination of employment, Agency reason for dismissal were discussed.
>
> —using poor judgement
> —slow learning curve
> —job performance lacking
> —lack of experience
> —lack of expertise for what health center needs.

Conclusions and Reasons Therefor

Under the collective-bargaining contract between the Respondent and the Federation, the Respondent apparently could discharge a probationary employee for good cause, bad cause, or no cause at all,[8] however, Respondent could not discharge a probationary employee for exercising the right to file a grievance under the collective-bargaining agreement.[9] Thus, if the ''real motive''[10] of the Respondent discharging Petteruto was that she filed a grievance under the labor agreement, the Respondent has violated Section 8(a)(3) of the Act.

Among the reasons cited the Respondent for her discharge was that Petteruto ''showed poor judgment in filing this

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[3] Piva denied this meeting. Petteruto is credited.

[4] Piva memorialized this conversation in a memo dated March 20 (G.C. Exh. 4).

In pertinent part, the memo read:

> Discussed filing and response of the grievance regarding lunch breaks . . . told Andrea such action showed poor judgement by taking such extreme action without going through the normal and expected routes for solving work-related problems.

[5] A staff meeting had been held on March 26, 1990. Petteruto was absent because of illness.

[6] John Vincent Callaci, federation representative, contacted McGuire about Petteruto's discharge around April 4, 1990, McGuire denied ''the reason for the discharge.'' She also said that ''she was angry that she grievance was filed, regarding the lunch time grievance'' McGuire was not called as a witness. Callaci had related to McGuire that Dr. Piva had told Andrea that ''she was fired for filing a grievance and that he had mentioned her name saying that McGuire wanted her fired on the spot.'' Callaci also conferred with Anna Rosa Sullivan who is president of the board of directors and acts as agent of the Employer with the authorization of the board about Petteruto's discharge on April 17, 1990. Callaci related to Sullivan that Petteruto was fired for filing a grievance and what Piva had said were the reasons for firing her. Sullivan replied that McGuire had fired Petteruto not Piva. Sullivan further said, that ''Beverly McGuire was in fact angry when Ruggieri filed the grievance over the lunch time.'' Sullivan did not specifically deny any of the foregoing testimony of Callaci.

[7] Piva testified that he had had no intention of firing Petteruto prior to March 30, 1990.

[8] ''An employer may discharge an employee for good cause, bad cause at all, without violating Sec. 8(a)(3), as long as his motivation is not antiunion discrimination and the discharge does not punish activities protected by the Act.'' *L'Eggs Products v. NLRB*, 619 F.2d 1337, 1341 (9th Cir. 1980).

[9] ''The submission grievance based on the collective bargaining agreement cannot be the basis of a discharge.'' *Selwyn Shoe Mfg. Corp.*, 228 F.2d 217, 221 (8th Cir. 1970). See *State Mechanical Constructors*, 191 NLRB 393, 396 (1971).

[10] ''[T]he 'real motive' of the employer in an alleged Section 8(a)(3) violation is decisive.'' *NLRB v. Brown Food Store*, 380 U.S. 278, 287 (1965). ''It is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test.'' *Teamsters Local 357 v. NLRB*, 365 U.S. 667, 675 (1961). ''Section 8(a)(3) prohibits discrimination in regard to tenure or other conditions of employment to discourage union membership. . . . It has long been established that a finding of violation under this section will normally turn on the employer's motivation.'' *American Ship Building Co. v. NLRB*, 380 U.S. 300, 311 (1965).

grievance.'' Petteruto was also told Piva that ''such action showed poor judgment by taking such extreme action. (G.C. Exh. 4.) The language chosen, when taken with the fact that both Piva and McGuire acted using poor judgment as the prime reason for the discharge brooks no other reasonable interpretation than that filing a grievance was considered a dischargeable offense. Thus it is clear that at least one of the reason cited by the Respondent for Petteruto's discharge was that she had filed a grievance under the contract. Such reason sustains an unlawful motive. Assuming arguendo that the other motives were lawful, it seems clear that the lawful motive for discharging Petteruto cannot be separated from its unlawful motive. The Supreme Court had opined in the case of *NLRB v. Transportation Management Corp*., 462 U.S. 393, 403 (1983).

> The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.

Accordingly, I find that the Respondent has failed to rebut the General Counsel's prima facie case and violated 8(a)(1) and (3) of the Act when it discharged Petteruto. See *Wright Line*, 251 NLRB 1083 (1980). See also *Sea Land Service*, 280 NLRB 720 (1986); *Herman Bros*., 252 NLRB 848 (1980).

Additionally, I credit Petteruto's testimony in which she attributed these remarks to Piva when he discharged her, ''you did it to yourself by going to the union and that when Bev McGuire received the grievance she wanted to fire you on the spot.'' Piva's testimony was not enhanced by the failure of the Respondent to call McGuire as a witness. Moreover, Petteruto had never been warned that he her alleged shortcomings would result in her probable discharge. I conclude and find that had Petteruto not filed the lunchtime grievance she would not have been discharged. The real reason and the motivating factor for her discharge was the filing of the grievance.

Accordingly, by the discharge of Petteruto on March 30, 1990, the Respondent violated Section 8(a)(1) and (3) of the Act. By Piva's statement to Petteruto that she had been discharged because she used poor judgment in filing a grievance under the labor agreement violated Section 8(a)(1) of the Act.

By Piva's statement to Petteruto that she had been discharged because she used poor judgment in filing a grievance under the labor agreement, the Respondent violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and it will effectuate the purposes of the Act for jurisdiction to be exercised.

2. By interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. By unlawfully discharging Andrea Jean Petteruto on March 30, 1990, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that the Respondent has engaged in certain unfair labor practices, it is recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It also having been found that the Respondent unlawfully discharged Andrea Jean Petteruto on March 30, 1990, and has since failed and refused to reinstate her in violation of Section 8(a)(3) of the Act, is is recommended that the Respondent remedy such unlawful conduct. In accordance with the Board policy, it is recommended that the Respondent offer the foregoing employee immediate and full reinstatement to her former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, dismissing if necessary any employee hired on or since the date of her discharge to fill said position, and make her whole for any loss of earnings she may have suffered by reason of the Respondent's acts herein detailed, by payment to her of a sum of money equal to the amount she would have earned from the date of her unlawful discharge to the date of an offer of reinstatement, less net interim earnings during such period with interest thereon, to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [11]

ORDER

The Respondent, Northwest Community Nursing and Health Service, Inc., Pascoag, Rhode Island, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging concerted union activities by unlawfully discharging employees for filing grievances against it under the labor agreement with the Union.

(b) Informing an employee that her discharge had been caused because she used poor judgment in filing a grievance under the labor agreement.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Carol Andrea Petteruto (Ruggieri) immediate and full reinstatement to her former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

previously enjoyed, discharging if necessary any employee hired to replace her, and make her whole for any loss of earnings she may have suffered by reason of the discrimination against her in accordance with the recommendations set forth in the remedy section of this decision.

(b) Expunge from its files any reference to the discharge of Andrea Petteruto (Ruggieri) and notify her that this has been done and that evidence of this unlawful action will not be used as a basis for future discipline against her.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Pascoag, Rhode Island facility copies of the attached notice marked ''Appendix.''[12] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges violations of the Act other than those found in this decision.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''